U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13429339

Date: JAN. 5, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a provider of home healthcare services, seeks to employ the Beneficiary as a physical therapist. The company requests his classification under the second-preference, immigrant category for members of the professions holding advanced degrees. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum educational requirements of the offered position or the requested immigrant visa classification. Specifically, the Director found that the Petitioner did not establish the Beneficiary's possession of a master's degree.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer generally must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks physical therapists and that employment of foreign nationals in these Schedule A positions will not harm the wages or working conditions of U.S. physical therapists. 20 C.F.R. § 656.5. Because prospective employers need not advertise Schedule A occupations to the U.S. general population, DOL authorizes USCIS to adjudicate labor certification applications for physical therapists in petition proceedings. 20 C.F.R. § 656.15(a). Thus, in this matter, USCIS rules not only on the petition, but also on its accompanying labor

certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS's Schedule A labor certification determinations as "conclusive and final").

II. THE EDUCATIONAL REQUIREMENTS

An advanced degree professional must have an advanced degree or its equivalent. Section 203(b)(2)(A) of the Act. The term "advanced degree" means:

> any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

A petitioner must also demonstrate a beneficiary's possession of all job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification application to determine a position's minimum requirements.

Here, the Petitioner's labor certification application states the minimum requirements of the offered position of physical therapist as a U.S. master's degree, or a foreign equivalent degree, in physical therapy, physiotherapy, or a closely related field. The application states that the position requires neither training nor employment experience. The application also states that the Petitioner will not accept an alternate combination of education and experience.[2]

On the labor certification application, the Beneficiary attested that, by the petition's priority date, a Filipino university awarded him a master's degree in physical therapy. The Petitioner submitted copies of documents in the Beneficiary's name from the university, including a copy of a 1999 bachelor of science degree in physical therapy and a corresponding transcript. The Petitioner also submitted transcripts in the Beneficiary's name from two other Filipino educational institutions and an independent, professional evaluation of the Beneficiary's foreign educational credentials. The evaluation concludes that the Beneficiary's university education and coursework at the two additional foreign institutions together equate to a U.S. master's degree in physical therapy.

As the Director found, the record "does not demonstrate that the beneficiary has a master's degree." Under the terms of the labor certification application, the Beneficiary must have at least a U.S. master's degree or a foreign equivalent degree. The evaluation concludes that the Beneficiary's foreign *education* equates to a U.S. master's degree. But the evaluation does not specify that his foreign

[1] This petition's priority date is January 14, 2020, the date of the petition's filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] In addition, part H.14 of the labor certification application, "Specific skills or other requirements," states that the position requires a license to practice physical therapy in Oregon. The Beneficiary's possession of the required license is not at issue.

degree equates to a U.S. master's degree. Rather, the evaluation finds that his degree - when combined with courses he took at two other institutions - equates to a U.S. master's degree. The labor certification application specifies that "No" alternate combination of education and experience is acceptable. Thus, the Beneficiary's combined coursework does not meet the minimum educational requirements of the offered position. Also, the evaluation states that the Beneficiary did not receive degrees from the two other institutions where he studied. The transcripts from the other institutions also do not indicate their issuance of degrees to him. Thus, contrary to the requirements of the offered position, the record does not establish the Beneficiary's possession of a U.S. master's degree or a foreign degree equating to one.

Also, contrary to the requirements of the requested immigrant visa classification, the record does not demonstrate the Beneficiary's possession of an advanced degree or its equivalent. Recall that an advance degree or its equivalent means either a U.S. degree or foreign equivalent degree above that of a baccalaureate, or a U.S. bachelor's degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree"). As previously discussed, the evidence does not establish the Beneficiary's receipt of a U.S. master's degree or a foreign equivalent degree. The record does demonstrate the Beneficiary's possession of a Filipino bachelor's degree. But, contrary to the regulation, the record does not demonstrate that the foreign degree equates to a U.S. baccalaureate. The evaluation does not find whether the foreign degree is the equivalent of a U.S. bachelor's degree. The record also does not demonstrate the Beneficiary's possession of at least five years of post-baccalaureate experience in physical therapy. On his Form I-485, Application for Adjustment of Status, the Beneficiary stated that he gained more than 19 years of physical therapy experience, including more than 13 years in the Philippines. But the Beneficiary did not list any related foreign experience on the labor certification application.[3] The Petitioner also did not submit letters from former employers of the Beneficiary documenting such experience. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to provide letters from a beneficiary's current or former employers to support claimed, qualifying experience). Thus, the record does not demonstrate the Beneficiary's possession of an advanced degree or its equivalent as required for the requested immigrant visa classification.

On appeal, the Petitioner states that it considers the Beneficiary's foreign degree to equate to a U.S. master's degree because the company "relied on the credentials evaluation." As previously discussed, however, the evaluation does not conclude that the Beneficiary's degree equates to a U.S. master's degree. Rather, the evaluation finds his degree - plus his other coursework - equivalent to a U.S. master's degree. This finding does not meet the requirements of the offered position listed on the labor certification, or the advance degree category. The Petitioner therefore mistakenly relies on the evaluation.

The Petitioner also argues that USCIS disregarded documentation from a U.S. university that the company submitted in response to the Director's written request for additional evidence (RFE). The documentation includes a transcript in the Beneficiary's name and information about the school's

[3] Section K of the labor certification instructed the Petitioner to "[l]ist all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification."

physical therapy programs. The Petitioner contends that the documents demonstrate the Beneficiary's completion of a doctoral program in physical therapy by the petition's filing. The Petitioner states:

> The decision to deny [the Petitioner's] petition is predicated on an oversight by USCIS, and evidences a clear disregard for its adjudicative responsibilities, which, at the most basic level, include the requirement to properly review and consider the record, and to apply the correct legal standard in the adjudicative process.

The Petitioner correctly notes that USCIS' decision does not discuss the Beneficiary's U.S. university documentation. In this case, however, the oversight constitutes harmless error.[4]

A doctoral degree is a higher degree than a bachelor's or master's degree. We therefore agree with the Petitioner that, if the Beneficiary obtained a U.S. doctorate in physical therapy by the petition's filing, he could have qualified for both the offered position and the requested immigrant visa classification. *See Matter of Wing's Tea House*, 16 I&N Dec. at 160 (requiring a petitioner to demonstrate eligibility by the time of a petition's priority date). The evidence, however, does not establish his receipt of a Ph.D. by the petition's filing.

First, B's attestation on the accompanying labor certification application belies his claimed, timely receipt of a doctorate. Asked in part J.11 of the application to indicate his "highest level [of education] achieved as required by the requested job opportunity," the Beneficiary checked a "Master's" rather than a "Doctorate" degree. He also listed his receipt of the relevant education from the Filipino university that issued his bachelor's degree, not the U.S. school that purportedly awarded the Ph.D.[5] The application's omission of the Ph.D. and the U.S. university that purportedly issued the advanced degree suggests that the Beneficiary did not achieve the degree by the petition's filing. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

The U.S. university documentation also does not establish his receipt of a Ph.D. by the petition's filing in January 2020. The documents show the Beneficiary's completion of all 30 credits of a seven-semester, doctoral program from an accredited U.S. university in the fall semester of 2019. But the transcript, which is dated April 14, 2020, does not indicate the school's issuance of a Ph.D. to the Beneficiary. The Petitioner also states that, when the company submitted its RFE response later in April 2020, the Beneficiary was still "waiting for the official degree conferral."

USCIS may recognize a beneficiary's receipt of a university degree before the issuance of a formal diploma. *Matter of O-A-, Inc.*, Adopted Decision 2017-3 *3 (AAO Apr. 17, 2017). But such recognition first requires a petitioner to establish a beneficiary's completion of all substantive degree requirements and the issuing school's approval of the credential. *Id.* at *4. Here, the U.S. transcript and accompanying school information indicate the Beneficiary's completion of the university credits

[4] The Petitioner had a reasonable opportunity to explain and submit evidence supporting the Beneficiary's purported, timely receipt of a Ph.D. in response to the Director's RFE. We therefore decline to remand the matter.

[5] By signing the labor certification application, the Beneficiary declared under penalty of perjury that the information in part J of the application was true and correct. *See also Matter of Valdez*, 27 I&N Dec. 496, 499 (BIA 2018) (citation omitted) (holding that a foreign national's signature on an immigration application establishes a strong presumption that he or she knows of and has assented to the application's contents).

required for a doctorate. But the record does not demonstrate the school's approval of a degree, acknowledging the Beneficiary's completion of all requirements for degree issuance. The transcript does not state a degree's issuance or otherwise acknowledge the Beneficiary's purported, degreed status.

Thus, the record does not establish the Beneficiary's possession of a Ph.D. in physical therapy by the petition's filing. Therefore, contrary to the Petitioner's argument, USCIS' consideration of the U.S. university documentation would not have resulted in the petition's approval.

For the foregoing reasons, the Petitioner has not demonstrated the Beneficiary's possession of the minimum educational requirements of the offered position or the requested immigrant visa classification. We will therefore affirm the petition's denial.

III. VALIDITY OF THE SCHEDULE A LABOR CERTIFICATION

Although unaddressed by the Director, the record also does not establish the validity of the accompanying Schedule A labor certification application or the Petitioner's intention to employ the Beneficiary in the offered position.

A business filing an immigrant visa petition must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Also, a labor certification for a Schedule A occupation remains valid only for the foreign national and occupation stated on it. 20 C.F.R. § 656.30(c)(1). A petitioner may not use the labor certification of another employer unless the petitioner establishes itself as the "successor-in-interest" of the other employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). For immigration purposes, a successor must demonstrate its acquisition of the rights and obligations needed to carry on the business of a prior employer or a discrete part of that business. A successor must: 1) fully describe and document the transaction(s) transferring all, or a relevant part, of the prior employer's business to it; 2) demonstrate that the job opportunity remains in the same occupation as stated on the labor certification; and 3) prove eligibility for the requested benefit, including the ability of the successor and the prior employer to continuously pay the proffered wage from the petition's priority date onward. *Matter of Dial Auto*, 19 I&N Dec. at 482-83.

Here, the petition and the accompanying labor certification state the Petitioner's intention to permanently employ the Beneficiary as a physical therapist. In November 2020, while this appeal was pending, however, the Petitioner publicly announced its agreement to merge with another healthcare company.

The record does not indicate whether the merger would provide the Beneficiary with a different prospective employer than the Petitioner. If so, the record also does not demonstrate whether that new employer would constitute a successor-in-interest of the Petitioner. The record therefore does not

establish the Petitioner's continuing intention to employ the Beneficiary in the offered position or in the occupation stated on the labor certification.

Thus, in any future filings in this matter, the Petitioner must submit additional evidence of its continuing intention to employ the Beneficiary in the offered position and occupation of physical therapist. If the merger results in a new employer, that employer must establish itself as the successor-in-interest of the Petitioner's physical therapy business, with the ability to pay the proffered wage.

Also, a Schedule A petitioner offering a non-union position must demonstrate that it posted notice of the application's filing to its employees. Section 212, Note 6 of the Act; *see also* 20 C.F.R. § 656.15(b)(2) (incorporating the notice-of-filing requirements of 20 C.F.R. § 656.10(d) into Schedule A proceedings).

> If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question.

DOL, "OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers," Notice of Filing, Q.12, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited Dec. 17, 2020).[6]

Here, the labor certification application indicates that a collective bargaining agreement does not cover the offered position of physical therapist. The certification also states that the position involves providing physical therapy services at homes of "unanticipated" clients in two Oregon counties.

The Petitioner submitted evidence that the company provided notice of the application's filing to its employees via the company's intranet and by posting notice at the company's regional office where its physical therapists in Oregon receive their assignments and performance reviews. Contrary to DOL's guidance, however, the Petitioner has not demonstrated its posting of notices at the worksites of its current clients. For this additional reason, the record does not establish the validity of the labor certification application.

Thus, in any future filings in this matter, the Petitioner must also submit copies of notices of the application's filing posted at the worksites of current clients.

IV. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's possession of the minimum educational requirements of the offered position or the requested immigrant visa classification. We will therefore affirm the petition's denial.

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[6] A published, DOL answer to a frequently asked question (FAQ) lacks the force of law. *Matter of HealthAmerica*, 2006-PER-00001 **12-14 (BALCA Jul. 18, 2006) (*en banc*). But an FAQ answer may constitute persuasive authority based on the thoroughness of its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and other factors giving it persuasive power. *Id.*

ORDER: The appeal is dismissed.